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Brian E. Bowcut
Utah State University

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ONLINE, ON TRIAL:
PORNOGRAPHY, THE CONSTITUTION
AND THE COMMUNICATIONS DECENCY ACT OF 1996

by

Brian E. Bowcut

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of the requirements for the degree

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Introduction

Cyberspace, in its present condition, has a lot in common with the 19th Century West. It is vast, unmapped, culturally and legally ambiguous ... hard to get around in, and up for grabs. ... It is, of course, a perfect breeding ground for both outlaws and new ideas about liberty...¹

So assesses Grateful Dead lyricist-turned-cyberguru John Perry Barlow the new frontier, that vast expanse of computer networks known as the Internet. Yet, in recent months, the law has come to this chaotic domain, where anything goes and nothing remains unsaid. With the passage of the Communications Decency Act of 1996 (CDA), Congress has given the federal government the task of civilizing the Net. In the Department of Justice's sights are a particular brand of outlaw: those who peddle smut to minors, and those who allow it to happen.



Within cyberspace's "perfect breeding ground" of ideas has arisen a huge repository of every type of sexually explicit material imaginable, a virtual library of porn that has shocked parents who fear that their computer-whiz children will discover or be exposed to the seamy side of the Net. Such fears have galvanized Christian and family groups behind the need for government regulation of the content of the information superhighway. But is such regulation constitutional? There are other groups who aren't so keen on the sheriff coming to cyberspace. Civil libertarians argue that the CDA goes too far, outlawing what would be legal in print and casting a "chilling effect" over the Net, as network users and providers pull all controversial materials rather than run the risk of prosecution.

At issue, then, are individuals' freedom of speech under the First Amendment and a

¹John Perry Barlow, "Crime and Puzzlement: Desperados of the DataSphere," *Whole Earth Review* (Sausalito, Calif., Fall 1990). Quoted in Tracy LaQuey, *The Internet Companion* (Reading, Mass.: Addison-Wesley, 1993), p. 125.

societal interest in protecting children. But which interest is more important? Where does the Constitution come down on the subject?

Were the law but a bit more computer-savvy. One of the problematic issues in modern jurisprudence is knowing exactly what the Constitution's authors meant when they wrote it -- in legalese, this is the concept of "original intent." When examining thorny issues such as abortion or the right to bear arms, it would be comforting to know that the document the founding fathers penned in 1787 contains guidelines for all the legal dilemmas that could possibly arise. Unfortunately, the Constitution is notoriously vague on matters that have come to be of great importance to our nation.

Squaring "free speech" with computer porn is a prime example. When the Bill of Rights' authors used the language "Congress shall make no law...", did they really mean *no* laws abridging American's right to say what they want? The courts haven't interpreted the document that way. For instance, it's an established rule that yelling "fire!" in a crowded theater is not protected under the First Amendment because there is a greater societal interest at stake -- public safety. Similarly, the Court has afforded lower levels of Constitutional protection to certain categories of speech deemed peripheral to the First Amendment's central mission of arriving at the truth through the public exchange of ideas. These groupings include, among others, commercial speech, "hate speech" -- and sexually explicit material. Yet even the broad category of "smut" has been granted varied differing levels of protection depending on the nature of the material, what medium it appears in and who has access to it.

Thus an analysis of the constitutionality of the Communications Decency Act has a lot of ground to cover. First comes defining the computer and legal terms that will pop up frequently in

discussion -- particularly "obscenity," as set forth in *Miller v. California*.² The next step is to determine what sort of medium the Internet and other computer networks are, for the law does not grant all media the same level of First Amendment protection. Next comes a focus on the two cases most relevant to the CDA challenge: *FCC v. Pacifica* and *United States v. Thomas*.³ The final step is to apply to the CDA the constitutional principles built up in a wealth of legal precedent. Here several issues will come into play: the legal concepts of "vagueness," "overbreadth" and "least restrictive means." If the CDA is to pass constitutional muster with the federal court in Philadelphia, it will be on these points.

Definitions

Before exploring the nature of the Internet as a medium or examining the relevant case law, however, it will help to wade through some of the terms that will come up frequently in the discussion.

The *Internet* is a global network of individual computers and computer networks which now connects over five million host computers at universities, libraries, offices, government agencies and private homes.⁴ The Internet was born in 1969 with the creation of a single network known as Arapnet, as a Defense Department experiment in networking. Its original purpose was to provide researchers with access to expensive computer hardware. From there other networks were linked to it, most notably the National Science Foundation Network and the Usenet

²413 U.S. 15 (1973).

³438 U.S. 726 (1978); 74 F.3d 701 (6th Cir.).

⁴"Federal Legislation Confronts Cybersmut," *New York Law Journal* (April 22, 1996), p. S8.

(discussed below). Access was gradually extended from its defense and academic research core to individuals and private organizations. The Internet has demonstrated such effectiveness as a communications medium that it has gone beyond its original mission and is now used by all sorts of people, from educators and businesspeople to hobbyists and students to politicians. It offers near-instantaneous communication, bringing together people and information from across time zones and national borders.⁵

The *Usenet* is a worldwide conferencing system, a community of people and organizations who read, contribute and respond to messages from one another. Much of its traffic travels over the Internet, and it is sometimes referred to as part of the Net. The Usenet is divided into topical newsgroups, ranging from sex to politics to religion to Dave Barry fans. Computers and sites in the network pick which newsgroups they want to carry and let their users participate in. By 1993, there were some 2,100 discussion groups on the Usenet.⁶

The *World Wide Web* is a part of the Internet, a browsing and searching system that allows users to explore a seemingly unlimited “web” of “pages.” These pages are documents of text and graphics linked together through “hypertext” pointers, which lead to other documents on related subjects. Users thus travel the strands of the web, locating information of interest to them.

“Search engines” like Yahoo allow users to search for key words in documents (enabling, for instance, those interested in sexually explicit material to quickly find what they’re looking for).⁷

Bulletin board systems or BBSs are online services, some attached to the Internet and some

⁵LaQuey, pp. 1-6.

⁶Id., pp. 60-62.

⁷Id.

not, similar to regular bulletin boards: information is tacked up for everyone to read and taken down when it's no longer relevant. Some BBSs also offer services like conferencing capabilities, computer games, data bases and "chat rooms," a sort of "verbal," interactive equivalent to Usenet newsgroups.⁸

Access providers are simply those who offer access (usually dial-in) to their computer systems as pathways to the Internet "network of networks." These providers range from small private companies to universities to employers to national providers like America Online and CompuServe.⁹ At issue in the case of the CDA is whether some of these organizations and business are not merely access providers but also content providers, offering services or in some other way exercising control over the material, such as pornography, that passes through their systems.

Also essential to an understanding of the court challenge to the CDA is a knowledge of the legal definitions of sexually explicit material, a rather broad term that has been refined and subdivided by the courts.

Obscenity is hard-core sexual material so graphic and unredeeming that it meets the three-part test elicited by the Supreme Court in *Miller v. California*: (1) it appeals to the prurient interest (an abnormal or excessive interest in sex; (2) it depicts or describes sexually explicit conduct in a patently offensive way; and (3) it lacks serious literary, artistic, political or scientific value. Obscenity is not protected speech under the First Amendment and its purveyors may be

⁸Id.

⁹Id.

prosecuted, regardless of the medium used.¹⁰ Given the great societal interest in safeguarding children, the Court has also deemed all forms of child pornography -- regardless of whether they meet the standard outlined above -- outside the umbrella of protected speech and thus open to the same regulation as obscenity.¹¹

Indecency, as the Supreme Court has applied it to the broadcast media, is a "pattern of patently offensive depictions or descriptions of sexual or excretory activities or organs."¹² It is a "lesser form" of sexually explicit material; most Playboy- and Penthouse-style images would fall into this category. This material is legal for adults, but in broadcast media can be regulated so that it is kept from children. No such regulation applies to the print media. One of the central issues in the CDA challenge is whether the new law's use of the word "indecent" is vague and hence unconstitutional, or clearly refers to the definition elicited above and would apply standards of broadcast regulation to the Internet.

Internet Porn and the Communications Decency Act

Pornography is, simply put, pervasive on the information superhighway. One of the most popular destinations on the Internet is the Playboy World Wide Web home page, which receives nearly four million visits a day.¹³ Pornography is publicly available through the Internet at numerous sites on the Web as well as in various sections of the Usenet. It is also traded via e-

¹⁰413 U.S. 15 (1973).

¹¹*New York v. Ferber*, 458 U.S. 747 (1982).

¹²*FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

¹³"Federal Legislation Confronts Cybersmut."

mail and BBS sites set up for exchanging sexually explicit material.¹⁴

In a now infamous article that revealed the sheer amount of smut on the Net, *Time* magazine chronicled an exhaustive study by researchers at Carnegie Mellon University on online porn. Over an 18-month period, the team surveyed more than 900,000 sexually explicit pictures, short stories and film clips. On those Usenet newsgroups where digitized images are stored, nearly 84 percent of the pictures were pornographic. And at one U.S. university, 13 of the 40 most visited Usenet groups had names like alt.sex.stories, rec.arts.erotica and alt.sex.bondage. Using data obtained with permission from BBS operators, the team identified (but did not publish the names of) consumers in more than 2,000 cities in all 50 states and 40 countries around the world -- including China, where possession of pornography can be a capital offense. The Carnegie Mellon study found not just naked women but a "grab bag" of deviant material including pedophilia (nude photos of children) and images depicting bondage, sadomasochism, urination, defecation and sex acts with barnyard animals. However, lest it convey the impression that the *only* thing on the Internet was sex, the study was quick to point out that pornographic image files represented only about 3 percent of all Usenet messages, and the Usenet itself represents only 12 percent of Internet traffic.¹⁵

The great fear is not that adults or college students will discover Internet smut, but rather that it will fall into the hands of those much younger -- children, who lack the emotional maturity to make sense of what they see. They might come upon an explicit web site by accident, or worse

¹⁴Family Research Council, "Computer Pornography Questions and Answers," *In Focus* (www.townhall.com/townhall/FRC/infocus/if95k4pn.html, November 8, 1995), p. 1.

¹⁵Hannah Bloch, Wendy Cole and Sharon E. Epperson, "On a Screen Near You: Cyberporn," *Time* (July 3, 1995).

yet, fall prey to child molesters hanging out in chat rooms frequented by youth. Exacerbating the problem is that children often know more about the Internet than their parents do. "We face a unique, disturbing and urgent circumstance, because it is children who are the computer experts in our nation's families," said Republic Senator Dan Coats of Indiana, who co-sponsored the CDA with Senator James Exon, a Nebraska Democrat.¹⁶

Thus Congress was presented in the 1995-96 legislative session with the goal of finding some means of regulation to protect minors from the "adult" portions of the Net. Its attempt to achieve this end is found in Title V of the 1996 telecommunications legislation. The Telecommunications Act, passed by Congress on Feb. 1 and signed into law by President Clinton on Feb. 8, amends the Communications Act of 1934 to keep pace with changing times, substantially altering regulation of the entire communications industry.¹⁷ Title V contains the CDA, the controversial provisions of which are listed below:

The CDA amends 47 U.S.C. Section 223 (a) (1) (B) to read:

Whoever in interstate or foreign communications by means of a telecommunications device knowingly (I) makes, creates, or solicits, and (ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent knowing that the recipient of the communication is under 18 years of age regardless of whether the maker of such communication placed the call or initiated the communication, shall be fined [up to \$100,000] under title 18, United States Code, or imprisoned not more than two years, or both.¹⁸

And 47 U.S.C. Section 223 (d) now reads:

¹⁶Id.

¹⁷"Federal Legislation Confronts Cybersmut."

¹⁸*The Communications Decency Act of 1996* (www.cdt.org/policy/freespeech/12_21.cda.html, December 21, 1995).

Whoever (1) in interstate or foreign communications knowingly (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined [up to \$100,000] under title 18, United States Code, or imprisoned not more than two years, or both.¹⁹

The CDA thus makes it a crime to transmit "obscene or indecent" messages over telecommunications devices to minors or to transmit "patently offensive" messages over interactive services that might be available to minors. The CDA also extends 18 U.S.C. Section 1462 to prohibit use of an interactive computer service for the dissemination of information concerning "any drug, medicine, article, or thing designed, adapted or intended for producing abortion."²⁰ But while the Department of Justice has declared its intention to prosecute pornography cases, it has refused to enforce the ban on abortion information in accordance with longstanding policy. In a letter to Vice President Gore on Feb. 9, Attorney General Janet Reno reiterated her department's position, laying out a line of Supreme Court cases extending First Amendment protection to abortion speech.²¹ Since the government will not enforce the abortion provision, it has merited little attention in discussions of the CDA's legality and will not be a

¹⁹Id.

²⁰Id.

²¹Janet Reno, *Statement on Department of Justice policy regarding abortion speech* (www.cdt.org/ciec/abort_speech.html). See *Associated Students for Univ. of California at Riverside v. Attorney General*, 368 F. Supp. 11, 21-24 (C.D. Calif. 1973); *Bolger v. Youngs Drug and Product Corp.*, 463 U.S. 60 (1983); and *Bigelow v. Virginia*, 421 U.S. 809 (1975).

focus of this paper.

The debate over the CDA's other sections, however, rages on. The ink from President Clinton's pen hadn't even touched the Telecommunications Act before the constitutionality of the CDA was challenged. Congress itself foresaw a flurry of court activity, including in the CDA an expedited review procedure. If any portion of the CDA is held unconstitutional, the decision will be reviewable by direct appeal to the Supreme Court.²²

On Feb. 8, the American Civil Liberties Union and 19 co-plaintiffs filed suit in federal district court in Philadelphia against the Department of Justice, arguing, *inter alia*, that the CDA's use of the terms "indecent" and "patently offensive" was unconstitutional and that the new law, applied to the Internet, allows an unprecedented level of interference with First Amendment protection of free speech. On Feb. 27, the American Library Association and 22 other information-oriented businesses and organizations filed another lawsuit,²³ which was consolidated with the ACLU complaint.

On Feb. 15, Judge Ronald Buckwalter barred the government from enforcing the portion of the CDA which criminalized making "indecent" materials available to minors via computer networks. In his order, Buckwalter said the plaintiffs had raised "serious, substantial, difficult" questions about whether the law, specifically its reliance on the term "indecent," was unconstitutionally vague.²⁴ The Department of Justice has announced it will not prosecute any

²²"Federal Legislation Confronts Cybersmut."

²³The Society of Professional Journalists is a party to the ALA complaint.

²⁴"Memorandum Granting a Temporary Restraining Order," *ACLU, et al. v. Janet Reno* (www.epic.org/free_speech/censorship/lawsuit/TRO.html, Feb. 15, 1996).

cases under the CDA until a court review is concluded.²⁵ That announcement notwithstanding, the Philadelphia court had to clarify its order on May 15 after news reports detailed an apparent FBI probe of pornography on CompuServe. Patrick Trueman, an official of the American Family Association, had allegedly found Playboy-style pictures in a CompuServe database accessible by children. He complained to a Justice Department official, who thanked him for the tip and immediately dispatched a press release about the "investigation." Upon castigation by the court, the FBI promptly dropped the case.²⁶

Hearings throughout the months of March, April and May have seen dozens of witnesses take the stand, addressing such issues as the nature of the Internet, the pervasiveness of indecency and obscenity online, access providers' capacity to comply with the new law, and the availability and effectiveness of other measures to protect children -- viz., "parental empowerment" software that allows adults to filter the areas of the Net accessible by their children. A decision in the case, which both the plaintiffs and the Department of Justice have promised to appeal to the Supreme Court, was expected as early as the first week of June.

Regulating a New Medium

The development of the 'information superhighway' will pose a bold challenge to the First Amendment. Newspapers, television programs, movies, phone calls, computer data, commercial services such as banking and shopping, and a host of other forms of information and communication all will be reduced to the same format -- digital bits -- and all will sent along the same medium -- fiber-optic cables. What once were separate fixtures in our households -- television,

²⁵Peter Lewis, "Internet Courtroom Battle Gets Cyberspace Preview," *The New York Times* (March 20, 1996), p. A14.

²⁶Steven Levy, "An Indecent Proposal: Will Congress's attempt to censor the Internet pass muster with three smart judges?" *Newsweek* (May 27, 1996), p. 80.

telephone, and computer -- will converge, in function if not in form.²⁷

The most fundamental issue surrounding the legal challenge to the Communications Decency Act is how the courts will choose to treat this new medium -- collectively known as the Internet, the "information superhighway," or simply the web of computer networks spanning the globe -- with which the law has so little experience. First Amendment jurisprudence has, in the course of history, built up not one comprehensive model applying "free speech," but rather two basic standards:²⁸ one for the print media and another for broadcast media. Newspapers, magazines and the like have generally enjoyed the broad protection of the First Amendment. But courts have allowed treated radio and television differently on the grounds that these technologies constitute a limited public resource, one which must be regulated to ensure both that is fit for consumption by all and that diverse viewpoints are presented. The CDA applies such broadcast-style regulation to the information superhighway, banning not only obscenity but also any indecent materials available to minors. Should the Internet and other computer services be treated like broadcast media? Or should they enjoy the greater First Amendment freedoms of print media?

The problem, of course, is that today's interactive computer networks do not fit neatly into either category, but rather share some attributes of both and add a set of their own unique characteristics. From a legal perspective, however, courts often analogize new electronic media to those older technologies for which there is a First Amendment model in place. Such is the case

²⁷Id.

²⁸Common carriers, such as the telephone industry, might be placed in a third category. Here the analysis focuses on the two main standards, print and broadcast, which stake out the range of allowed regulation of obscenity and indecency. See Id. for an elaboration of this trifurcated approach.

in Philadelphia: whether the three judges, and after them the justices of the Supreme Court, accept or reject the CDA's provisions against sexually explicit material will hinge largely on whether they choose such an analogy and which one they select. They may also decide to break new ground, defining computer networks as a unique medium worthy of its own First Amendment model. In making this determination, the court must focus not necessarily on such networks' technical similarities to other media, but rather the relationship between those technical characteristics and the underlying First Amendment values at stake.²⁹

The best-known First Amendment model is grounded in the "marketplace of ideas," a concept articulated in 1919 by Justice Holmes: "the ultimate good desired is better reached by free trade in ideas [and] the best test of truth is the power of the thought to get itself accepted in the competition of the market."³⁰ This vision places its faith in freedom from government regulation of speech; competition in the marketplace is best promoted when speakers are allowed their say, even in "the expression of opinions that we loathe and believe to be fraught with death."³¹ The courts have repeatedly applied this approach to the print media, applying them virtually absolute freedom from government interference where the speech involved has been held to be protected under the First Amendment. (For example, obscenity, as discussed earlier, is not protected speech and hence is outlawed in all media. But government cannot ban indecency in print form.)

In contrast, regulation of broadcasting has been justified on the grounds that no true

²⁹Levy, p. 80.

³⁰*Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting).

³¹*Id.*

“marketplace of ideas” exists for these media. Broadcasting is video or audio programming sent over airwaves to TVS or radios within range of the signal. It is a point-to-multipoint technology, featuring a single broadcaster reaching out to many receivers. The number of frequencies available for use by these broadcasters is limited by the physical capacity of the usable electromagnetic spectrum.³² In order to provide for orderly allocation of these frequencies, the Federal Communications Commission was charged under the Communications Act of 1934 with licensing broadcasters based on the “public interest, convenience, and necessity.”³³ Thus content regulation of television and radio was first based on the notion of “scarcity.” Since spectrum space was limited, the government was obliged to regulate the airwaves, acting in the public interest.

Court decisions in 1969 and 1978³⁴ extended this charge to allow the government to regulate indecency on television and radio, based not only on the public-interest argument of spectrum scarcity but also on such media’s pervasiveness, their easy accessibility by children, and difficulty of viewer control. These last three elements all tie into the premise that broadcast media, as point-to-mass means of communication, “‘push’ content at viewers and listeners, much in the manner of a billboard along a highway.”³⁵ The broadcast media are said to be “pervasive” because their signals are broadcast through the air, directly into homes, without any significant choice on any individual’s part. Thus the government may regulate offensive materials to protect

³²“The Message in the Medium.”

³³47 U.S.C. 309(a) (1988).

³⁴*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367; *FCC v. Pacifica Foundation*, 438 U.S. 726.

³⁵“The Message in the Medium.”

viewers' privacy interests, particularly those of parents and children, as articulated by the Supreme Court: "During most of the broadcast hours, both adults and unsupervised children are likely to be in the broadcast audience, and the broadcaster cannot reach willing adults without also reaching children."³⁶

Applying the "scarcity" and "pervasiveness" doctrines of broadcast law to the emerging electronic media is problematic -- in fact, some argue that they shouldn't even apply to television and radio. In the first place, all economic goods, not just the services provided by broadcasters, are scarce (there's only so much of everything). But technological advances have steadily increased the capacity of the broadcast spectrum to the point that any limits are largely theoretical. And as far as the argument of pervasiveness is concerned, critics respond that people who don't like what they're receiving can simply turn the television or radio off.³⁷

Given this historical backdrop of differing First Amendment approaches the broadcast and print media, the courts have had to decide how to apply these models to other media. When confronted with the possibility of applying broadcasting restrictions to media such as telephones and cable television, the Supreme Court has generally assumed that differences in the characteristics of new media justify differences in the First Amendment standards applied to them.³⁸ In other words, other media must exhibit similar attributes of scarcity and pervasiveness in order to merit the same regulation as television and radio. Courts have been reluctant to apply

³⁶*FCC v. Pacific Foundation*, 438 U.S. at 748.

³⁷Laurence H. Winer, "The Signal Cable Sends -- Part I: Why Can't Cable be More Like Broadcasting?" 46 *Maryland Law Review* 212, 215 (1987). Quoted in "The Message in the Medium."

³⁸Fred H. Cate, "Indecency, Ignorance and Intolerance: The First Amendment and the Regulation of Electronic Expression," *Journal of Online Law* (www.wm.edu/law/publications/jul/cate1.html, July 1995), par. 53.

the doctrine of pervasiveness to either cable television or telephones; they have noted that both these media require users to take "affirmative steps to receive the communication."³⁹ In the case of cable, users must choose to subscribe and must pay to receive the programming. They also have the option of blocking out channels unsuitable for children. To participate, say, in a dial-a-porn conversation on the telephone, a user must pick up the receiver and dial the number. The presence of these conditions led the Supreme Court to differentiate among standards for the various electronic media: "Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message."⁴⁰ The courts will have to apply similar scrutiny to the issues of pervasiveness and scarcity when considering the constitutionality of the CDA, the provisions of which mirror in many ways broadcast regulation.

The Department of Justice will be hard-pressed to make a case for either attribute, given the nature of communications on the Internet and other computer networks. On its face, the Internet resembles broadcast media in that it can deliver text, graphics, video and sound. But underneath the surface, computer networks may fit more closely the "marketplace of ideas" ideal than even the print media. Ideas of all stripes abound on the Internet; "reams" of government documents and the web sites of Christian and family organizations coexist with hard-core porn and sites espousing satanism.

Simply put, there is no centralized authority on the Net. People -- lots of them -- control the daily workings of cyberspace. The Internet is a cooperative endeavor among all the networks that make it up. The result? Writes one guide to cyberspace: "The Internet seems to be both

³⁹*Sable Communications of California, Inc. v. FCC*, 492 U.S. at 127-28.

⁴⁰*Id.* at 128.

institutional and anti-institutional at the same time, massive and intimate, organized and chaotic.”⁴¹ The Internet is a cooperative endeavor among all the networks that make it up, a distributed system on thousands of individual computers. It is designed so that different organizations can simply attach on. No single organization controls any membership on the Internet, nor is there any centralized point from which individual sites or services can be blocked. From a user’s perspective, the Internet’s various segments -- the Usenet, the World Wide Web, etc. -- may appear to be single, integrated systems, but in reality they have no centralized control point.⁴²

Given that better technology has rendered the scarcity rationale for regulating the broadcast media largely obsolete, the true issues behind this argument appear to be government concern with ensuring a diversity of viewpoints on the air, and, with respect to the business aspect, ensuring diversity of media ownership.⁴³ Both types of diversity are in abundance on the Internet, where there is a near-infinite spectrum for all who wish to communicate on the Internet and an abundance of competition.⁴⁴ On the Internet there are literally millions of speakers and publishers. Because of this unique “many-to-many” aspect of communication in cyberspace, there exists no monopoly on production, no “potential for abuse ... of private power” over “the free flow of information and ideas.”⁴⁵ As observed by press critic A.J. Liebling, “Freedom of the

⁴¹LaQuey, p. 27.

⁴²Center for Democracy and Technology, *Citizens Internet Empowerment Coalition Update No. 3* (www.cdt.org/ciec/bulletins/ciec-update.3.html, March 21, 1996), p. 2.

⁴³Winer at 212, 215. Quoted in “The Message in the Medium.”

⁴⁴Cate, par. 54.

⁴⁵*Turner Broadcasting System v. FCC*, 114 S. Ct. at 2466 (1994).

press is guaranteed only to those who own one."⁴⁶ And on the Internet, everybody "owns" the press -- though this naturally has its down side. Those wishing to bring their pornographic or erotic-fiction wares to the public need not shop their materials around until an adult cybermagazine decides to publish them; rather, they can simply upload their files to the World Wide Web, the Usenet or a bulletin board, where they will be available for all to peruse.⁴⁷

Proponents of the CDA take a different tack on the scarcity issue. While there may be no spectrum limitations, they argue that in a sense, the Internet *is* a public resource much like the broadcast spectrum. All Americans have a stake in the new technology; it was their tax money and the U.S. government's cooperation with industry and universities that created the backbone networks of the Internet and then opened it up to commercial and private users. Like all other places of public commerce and accommodation, they argue, the Net must be safe for all and open to adults and children alike.⁴⁸

The pervasiveness argument is also of debatable importance on the Internet and other computer networks. On the one hand, the Department of Justice argues that the amount of sexually explicit material available to minors on the Net is growing fast, "far exceeding anything available prior to the advent of on-line computer services."⁴⁹ Pro-CDA groups argue that even the most disgusting, repulsive pornography -- for example, bestiality and sadomasochism -- is just a

⁴⁶Quoted in Edwin Diamond and Stephen Bates, *Law and Order Comes to Cyberspace* (web.mit.edu/org/t/techreview/www/articles/oct95/Diamond.html, October 1995), p. 2.

⁴⁷Diamond and Bates, p. 2.

⁴⁸Bruce A. Taylor, "Will new decency standards on the Internet protect America's kids? Yes: Apply magazine-rack rules ot the Internet," *The Washinton Times* (March 4, 1996), p. 22.

⁴⁹"Justice Dept. Finds No Need To Stop Internet Portions of Telecom Act," *Communications Daily* (February 16, 1996), p. 2.

few clicks away from a child on a computer. But by and large, the Listservs, newsgroups, chat lines, gopher and World Wide Web that make up the Internet all require individuals to take the "affirmative steps" discussed earlier.⁵⁰ Along the lines of telephone technology (and the network is connected through modems and phone lines), cyberspace is a point-to-point, or perhaps multipoint-to-multipoint, medium which requires the active participation of the recipient.⁵¹ On the World Wide Web, for instance, nearly every site featuring sexually explicit material takes users first to at least one "warning page" urging them to "surf" elsewhere if they are offended by such text and images.

Aside from the arguments about scarcity and pervasiveness, which the courts will have to consider in deciding whether to apply broadcast-style regulations to the Internet, are two other features of the Net that make the application of either analogy, broadcast or print, difficult at best. They argue forcefully for consideration of computer networks in their own right -- as a separate medium with its own First Amendment standard.

First, the Internet quite literally knows no bounds, having spread by 1994 to at least 102 nations.⁵² Computer users in one country can access Internet sites -- including sites that might be deemed obscene or indecent -- in another country just as easily the can in their own. For example, the first page of Penthouse's World Wide Web editions contains this instruction: "If you are accessing Penthouse Internet from any country or locale where adult material is specifically

⁵⁰ALA Plaintiffs' Memorandum of Law in Support of Their Motion for a Preliminary Injunction (March 1, 1996), Sec. 3 (B).

⁵¹Alan Lewine, *Draft Outline of Constitutional Argument against CDA* (www.dcez.com/~alewine/cda96/960329outline.html, March 29, 1996), p. 8.

⁵²"The Message in the Medium."

prohibited by law, go no further.”⁵³ While Penthouse and other providers of sexually explicit material may hope this absolves them of any liability, it is questionable whether polite requests alone will deter Internet surfers from going where they want to go. Because it spans the globe, the Internet can subvert attempts by governments -- like the CDA in the United States -- to restrict this transnational flow of information. Designed to withstand even a nuclear attack, the decentralized network can’t be reined in by one country. The global network of overlapping links automatically reroutes messages when any one channel is blocked. Thus material banned in the United States could still find its way into American homes from foreign-based sites.⁵⁴

Boundaries also lack meaning even within the United States, for the same reasons: Internet sites are just as accessible no matter what state they originate in. The borderless nature of today’s interactive computer networks stands in stark contrast to the way illegal pornography has been dealt with in the United States. Differentiating between what is obscene and what is legal, if indecent, has traditionally been grounded in an assessment of the “local community standards.”⁵⁵ Yet such moral standards differ across the country and even among towns in the same state. Whose rules are to apply -- the standards of the community in which the Internet material originates, or those of the community in which a user receives it? Because text or images uploaded in one locale can be accessed just about anywhere else, application of the “community standards” test to computer networks raises the fear that users everywhere may be subject to the

⁵³Quoted in Diamond and Bates, p. 3.

⁵⁴Catherine Yang, “Law Creeps onto the Lawless Net,” *Business Week* (May 6, 1996), p. 58.

⁵⁵*Miller v. California*, 413 U.S. 15 (1973).

lowest common denominator -- the standards of the "least tolerant" community.⁵⁶

Regulating the Internet for obscenity and indecency also raises the issue of accountability -- who is to be held responsible for illegal material found on the Net. When a newspaper publishes libelous statements or a television station violates broadcast rules for decency, those media outlets' owners ultimately are responsible. But are online access providers similarly liable for, say, obscenity or child pornography uploaded by individual users, merely by having provided the cyberspace in which to post and view the offending materials? Worse yet, systems operators may end up caught in the middle: if one allows a user to post "indecent" material, the operator may be prosecuted; on the other hand, removing the offensive material may invite a lawsuit for the abridgement of free speech.⁵⁷

In any case, commercial providers as well as employers and educational institutions -- through which more and more people are gaining access to the Internet -- face troubling questions of liability. At Santa Rosa Junior College in California, two women filed a civil rights complaint against the college after finding themselves the subjects of sexually derogatory comments on a school-run, males-only chat group. The women argued that the chat group violated federal law because it excluded women and the chat messages constituted sexual harassment. They demanded that the journalism instructor who ran the online system be fired for aiding and abetting the harassment. Anxious to avoid a lawsuit, the school quickly awarded the women cash compensation and placed the instructor on indefinite leave. "Online" sexual harassment also becomes an issue in the workplace. In the past, courts have ruled that tacking up

⁵⁶Jonathan Rosenoer, "Indecent Communication," *CyberLaw* (www.cyberlaw.com/cylw1295.html, December 1995), p. 3.

⁵⁷Diamond and Bates, p. 3.

Playboy centerfolds on the office bulletin board can constitute harassment; the courts may rule that displaying such images on computer monitors is little different.⁵⁸

Cases within cyberspace but outside the realm of sexually explicit materials nevertheless have implications for Internet providers worried about liability for all manner illegal activities conducted by their users. For example, the New York brokerage firm Stratton Oakmont sued the Prodigy online service for libel after a series of postings on Prodigy's "Money Talk" forum accused the firm of securities violations. Prodigy lawyers argued that the service is a passive carrier of information, like a telephone company. Stratton Oakmont asserted, however, that Prodigy is a publisher and hence responsible for all communications on its service. A New York state judge ruled that Prodigy, which regularly screens postings for obscene or potentially libelous content, exerts some editorial control over its service's content and thus can be sued as a publisher. Prodigy is now appealing that ruling.⁵⁹

One thing is certain: if system operators are deemed responsible, they will monitor content much more closely -- and pass the cost of monitoring on to users. Fees will increase as access providers spend money fending off lawsuits.⁶⁰ Of course, there is a "marketplace of ideas" alternative to government regulation in this situation. When a lawyer complained about that several postings on America Online had defamed the product of one of his clients, AOL general counsel Ellen Kirsch responded by sending him an AOL starter kit with three hours of free time and urging him to put up postings defending the product -- a response that would have been very

⁵⁸Id., p. 6.

⁵⁹Id.

⁶⁰Id.

much to the liking of the late Supreme Court Justice Louis Brandeis, who believed that more speech, not censorship, was the solution to "bad speech."⁶¹ Similarly, a "more speech" campaign railing against the evils of pornography and teaching parents how to use software that blocks indecency may be a more constitutionally appropriate response than the CDA.

Determining how to treat this new medium is likely the most daunting task facing the judges now reviewing the CDA. Since applying the First Amendment in freedom of speech cases has evolved into a process differentiated among the various media, the assessment of interactive computer networks' characteristics as a medium will vital to the outcome of the court challenge. If the Internet and its kin are classified along broadcast or print lines, the next step, applying the relevant case law to determine the CDA's constitutionality (to be discussed in the next section) is fairly straightforward. In making such a classification, issues of scarcity, pervasiveness, "borderlessness" and accountability will take center stage. The plaintiffs make a powerful case that the rationale behind regulation of broadcasting cannot be applied to computer networks. At hearings in Philadelphia, Judge Stewart Dalzell's questioning leaned clearly in favor of a libertarian standard: "What is it about this medium -- the most democratic of mediums that the human mind has come up with yet -- that makes it different from print in terms of the constitutional protection it should receive?"⁶² Yet accepting this argument has serious ramifications, for it will result in the extension of broad First Amendment protection to an emerging medium rife with "bad speech," indecency and obscenity. Alternatively, the court to take the route of broadcast-style regulation, a determination that would likely leave the CDA in

⁶¹Id., p. 3.

⁶²Quoted in Levy, p. 80.

place -- to the dismay of Net libertarians. There is also a third option: classifying interactive computer networks as a distinct medium in need of its own First Amendment rationale. This course is the hardest, for here the court would be pressed into fashioning its own approach rather than relying on a body of definitive case law.

Setting Precedent: Two Fundamental Court Cases

Constitutional law in the United States is grounded in two sets of tools: the Constitution itself, and the case law that, over time, produces an increasingly refined interpretation of the Constitution. Each appeal heard by the Supreme Court adds to precedent, thus providing guidelines for future legal challenges.

With regard to media freedoms, First Amendment jurisprudence has over the course of its history singled out various types of communication as "unprotected," such as hate speech. Obscenity, as defined earlier, also falls into this category. Given it can provide a rational basis for doing so, government has been left relatively free to regulate these types of speech as it sees fit. However, any regulation of speech protected under the First Amendment is at once held to a higher standard of review known as "strict scrutiny." Recall, for example, that sexual materials which come in under the *Miller* obscenity standard -- simple "indecent" -- are protected speech. In order to avoid a finding that such regulation is unconstitutional, the government must show (1) that the regulation is justified by a compelling societal interest; (2) that the statute is "narrowly tailored" to serve that interest; and (3) that the regulation employs the "least restrictive means" of accomplishing the government objective.⁶³ Against this processual backdrop, discussion of the

⁶³*Turner Broadcasting System v. FCC*, 114 S.Ct. 2445 (1994).

CDA court challenge moves to the two elements of case law that, along with the *Miller* test, apply most to regulation of Internet porn:

FCC v. Pacifica Foundation (1978).⁶⁴ The Court held that the FCC had the authority to regulate an indecent, not necessarily obscene, radio broadcast -- George Carlin's now-infamous "seven dirty words" monologue, which was aired at two o'clock in the afternoon. The FCC had defined "indecent" as a "pattern of patently offensive depictions or descriptions of sexual or excretory activities or organs." The Court upheld the regulation on two grounds: that the broadcast spectrum is a public resource that must be regulated in the public interest, and that the government had a compelling interest in safeguarding children against the medium's "pervasiveness." The narrow ruling did not bar indecent speech completely from the airwaves; rather, it simply relegated the speech to hours when children were not likely to listen (a "least restrictive means"). Courts have subsequently held that some "safe harbor" -- such as a time of day -- must be provided for such programming.⁶⁵

United States v. Thomas (1996).⁶⁶ Robert and Carleen Thomas, who operated a sex-oriented computer bulletin board in Milpitas, Calif., were prosecuted and convicted on obscenity charges after they accepted a subscription from an undercover postal inspector in Tennessee. Although their BBS featured hard-core images of bestiality, oral sex and incest, the Thomases argued that their online materials were not obscene by urban California standards. Indeed, California authorities had declined to prosecute them. The charges instead were based on the far more

⁶⁴438 U.S. 726 (1978).

⁶⁵"The Message in the Medium."

⁶⁶74 F.3d 701 (6th Cir.).

restrictive "local community standards" (from *Miller*) of Tennessee. Court held the defendants liable on the basis that they knowingly accepted the Tennessee subscription when they could have rejected it.⁶⁷ The convictions were affirmed by an appeals court and could now wind up in the Supreme Court.

Both *Thomas* and *Pacifica* have fundamental implications for the legal light in which the Communications Decency Act is viewed. *Thomas* offers the first inkling as to how obscenity law might be handled on the Internet; it also illustrates the problem of applying the Miller test to cyberspace. Its implication is that electronic bulletin board operators may be liable for material deemed pornographic by the local standards of communities far from where that material was loaded onto the computer network. A substantial "chilling effect" may result from *Thomas*, as Internet content providers are forced to cater to the standards of the "least tolerant community" to escape prosecution.⁶⁸ To avoid this, the courts may choose to apply a new standard of obscenity to the Net, one that shies away from the "local community standards" of *Miller*. While this wouldn't necessarily be the doom of the CDA, it would change the way its provision against obscenity is interpreted.

Pacifica highlights the different regulatory approaches to print and broadcast media; while indecency enjoys First Amendment protection in print, it is restricted on-air. If the courts decide to treat the Internet as a broadcast-style medium, they may well choose to uphold the CDA and apply the *Pacifica* definition of indecency to the CDA provisions regulating "indecent" material. On the other hand, the courts may find the "seven dirty words" definition of indecency -- which

⁶⁷Daniel Appelman, "Policing the 'Net's Red Light District," *The National Law Journal* (March 25, 1996), p. C1.

⁶⁸*Id.*

the government argues should be the definition used in the CDA⁶⁹ -- too restrictive when applied to the Internet.

Analysis

Yet stripping the CDA of the *Pacifica* indecency definition leaves it with a fatal flaw: vagueness. This is the first among four crucial constitutional questions posed by the CDA that must now be discussed, bearing in mind the previous analysis of the case law and the problems of categorizing the Internet as a broadcast-style medium. Also relevant to the case are the legal concepts of "overbreadth" (the opposite of "narrowly tailored") and "least restrictive means."

Vagueness. Whether to apply the FCC's definition of indecency outside the realm of television and radio is the subject of some debate. If the court decides this is appropriate, it will be obliged to explicitly tie *Pacifica* indecency to the CDA to clear up the confusion. However, in issuing the temporary restraining order against enforcing some sections of the CDA, Judge Buckwalter expressed some hesitation to do so: Finally, it is doubtful because it is simply not clear, contrary to what governmentt suggests, that the word "indecent" has ever been defined by the Supreme Court. The Supreme Court has never passed on the FCC's broad definition, whether it is unconstitutionally vague."⁷⁰

The ACLU, ALA and other plaintiffs argue that, in the absence of a concrete definition for indecency, Internet users and providers may not even know what speech might subject them to prosecution. For example, a broad reading of the CDA might cover constitutionally protected

⁶⁹"Defendant's Opposition to Plaintiffs' Motion for a Temporary Restraining Order," *ACLU, et al. v. Janet Reno* (February 14, 1996).

⁷⁰See *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995).

speech such as AIDS prevention material for teenagers. The plaintiffs express concern that providers will likely ban communications that they consider potentially "indecent" or "patently offensive" in order to avoid criminal prosecution themselves.⁷¹

Overbreadth. The plaintiffs in the CDA challenge also argue that the act is "overbroad," meaning it has the potential to snuff out protected speech as well as the speech it was intended to regulate. Mike Godwin, staff counsel for the Electronic Frontier Foundation (an ACLU co-plaintiff) complained that the act would transform the Internet into a "children's reading room."⁷² In *Butler v. Michigan* (1957),⁷³ the Court ruled that states may not ban books that appeal to the prurient interest of minors. The First Amendment would be rather hollow, the Court continued, if it permitted adults to read only materials deemed suitable for children. Because the nature of the medium prevents content providers from knowing for certain the age of their users, the threat of prosecution may induce them to rid all sites of indecent text and images.

The CDA may also bar speech constitutionally protected for minors. The CDA could conceivably target any offensive reference to sexual activity or organs. Thus serious information valuable to older minors -- about, for example, safe sexual practices -- might be outlawed. Yet *Carey v. Population Services International* (1977)⁷⁴ established that minors have a constitutionally protected right to receive materials and information necessary for their intellectual development, including information about sexuality.

⁷¹"Memorandum Granting a Temporary Restraining Order."

⁷²Bloch, et al.

⁷³352 U.S. 380.

⁷⁴431 U.S. 678, 693.

Finally, opponents of the CDA complain that it could render "racy" material that is legal in print suddenly indecent and hence illegal when it is simply republished online. For instance, during court testimony in Philadelphia, Judge Dalzell asked one government witness how he would advise Vanity Fair if it wanted to run an online version of its classic cover featuring a very pregnant, very naked Demi Moore. The witness's response was that there was no guarantee Vanity Fair wouldn't be found in violation of the CDA.⁷⁵

From the other perspective, pro-CDA groups are furious at the liberty with which the plaintiffs interpret the CDA. They argue that, in real application, the CDA would never be applied so broadly as to reach protected speech. An amicus curae ("friend of the court") brief filed by the National Law Center for Children and Families urges the court to adopt a narrow interpretation of the CDA to save it from the possibility of unconstitutional overbreadth.⁷⁶

Least restrictive means. In *Sable Communications of California, Inc. v. FCC* (1989),⁷⁷ the court struck down a ban on "dial-a-porn" services because there were less restrictive ways available to keep minors from accessing dial-a-porn services -- such as screening using credit cards. Similarly, the plaintiffs argue that the CDA is unconstitutional because less restrictive, more effective means exist to keep minors from accessing indecency and obscenity via computer networks. What they're referring to is "empowerment" software, programs like Surfwatch, NetNanny and CyberSitter, all of which allow parents to block out certain types of sites on the Internet. Another alternative is the PICS (Platform For Internet Content Selection) system, a set

⁷⁵Levy, p. 80.

⁷⁶The National Law Center for Children and Families, "Brief filed in support of Janet Reno, Attorney General, and the U.S. Department of Justice," *ACLU, et al. v. Janet Reno*.

⁷⁷492 U.S. 115 (1989).

of protocols being developed at MIT that will permit independent third party ratings systems to operate on the Internet and commercial online services. The ratings would be received right along with Internet material, and parents would then be able use software to control the maximum rating allowed on their system. Such "empowerment" methods have the added advantage that, unlike the CDA, they would block offensive sites outside the United States as well.

Yet perhaps nowhere have those who support the CDA been so critical of the plaintiffs' arguments as they have been with respect to "least restrictive means." They argue that leaving the burden of protecting children from smut solely on the parents just won't work. Without liability and penalties for allowing minors to access indecent materials, restricting their access relies on porn distributors to voluntarily behave themselves. Already, the conservative Family Research Council asserts, there are electronic "how-to pamphlets" for circumventing blocking devices. As empowerment software gets better, so too will these aids.⁷⁸ And as for the children, they may just walk down the street to a friend's computer.⁷⁹

Conclusion

Determining whether or not the Communications Decency Act is constitutional is primarily a matter of categorizing it as a medium. If conclusions about the Internet's pervasiveness and its easy accessibility by children tie it closely enough to the broadcast media, then broadcast regulations apply, and *Pacifica* provides the definition for Internet indecency, as the government has argued. However, the plaintiffs make a strong case that computer networks, as a

⁷⁸Cathleen A. Cleaver, "FBI Child Porn Stings and a Virtual Denial of Reality," *Family Research Council Perspective* (www.townhall.com/townhall/FRC/perspective/pv95h7pn.html, September 14, 1995), p. 2.

⁷⁹Family Research Council, p. 2.

"democratic" medium featuring diverse viewpoints but no central control points, are worthy of sweeping First Amendment protection, either under the print rationale or under an approach devised specifically for the Net. The problems of applying the *Miller* obscenity test of "local community standards" to a borderless medium, underscored in *Thomas*, suggest that categorizing the Internet as a unique medium coming up with a new First Amendment approach may be the better route in the long run.

Whatever the case, if the broadcasting analogy doesn't apply to the Internet, then the CDA will have trouble passing constitutional muster. If the *Pacifica* indecency definition and the lower level of First Amendment protection that accompanied it don't apply to the Net, then what does the CDA's ban on making "indecency" available to minors mean? The CDA would thus fail the vagueness test and be found unconstitutional. But the argument can be extended even further. Under print-style standards, indecency -- despite a vague definition -- would be protected. And as protected speech, any regulation of it would come under the strict scrutiny of the court. No one doubts the government's compelling interest in safeguarding children from the perils of pornography and pedophiles. But at what price? For such regulation to overcome the high review standard of strict scrutiny requires not only the presence of a compelling government interest but also success against the tests of "overbreadth" and "least restrictiveness means." There is a substantial danger that the CDA will impose a "chilling effect" on Internet users and content providers, reducing discourse on the Net to standards acceptable to children and making illegal what is perfectly lawful at the newsstand or library. While CDA proponents correctly argue that this would come about only under a very broad interpretation of the act, it is also true that the leeway presented by the term "indecent" gives rise to the potential for arbitrary prosecution,

based not on objective standards of the law but rather on prosecutors' own value judgments.

The deck is stacked heavily against the CDA. For reasons outlined above, the presumption must be that it is unconstitutional unless the courts find that it should be regulated in much the same way as the broadcast media.

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